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No. 90-1124

Supreme Court, U.S.

FILED

JUN 26 1991

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IN THE
Supreme Court of the United States
OCTOBER TERM, 1990

KEITH JACOBSON,
Petitioner,
v.

THE UNITED STATES OF AMERICA,
Respondent.

On Writ of Certiorari to the
United States Court of Appeals
for the Eighth Circuit

BRIEF FOR THE PETITIONER

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QUESTION PRESENTED

Where the Government has attempted and failed in three separate undercover operations covering two years of testing and soliciting to persuade the defendant to receive child pornography through the mails and the petitioner does not qualify either under the Attorney General's Guidelines for the conduct of undercover operations or the guidelines established by the Postal Inspectors for inclusion in the undercover operation in which petitioner is finally ensnared, whether the petitioner has been entrapped as a matter of law?

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BRIEF FOR THE PETITIONER

OPINIONS BELOW

The Eighth Circuit's Panel Opinion is reported in 893 F.2d 999 (C.A. 8, 1990). The Eighth Circuit's Opinion on rehearing en banc is reported at 916 F.2d 467 (C.A. 8, 1990).

JURISDICTION

The Court has granted certiorari to the United States Court of Appeals for the Eighth Circuit to review a judgment and conviction obtained upon an indictment for a single count of violating 18 U.S.C. § 2252(a) (2) (1986).

Jurisdiction of the Court is invoked under 18 U.S.C. § 1254(1). The time factors upon which jurisdiction rests are:

- a. date of verdict: April 26, 1988;
- b. date of sentence: June 30, 1988;
- c. date notice of appeal was filed in the United States District Court for the District of Nebraska pursuant to Rule 4(b), F.R.App.P.: July 11, 1988;
- d. date en banc judgment affirming defendant's conviction entered by Eighth Circuit Court of Appeals: October 15, 1990;
- e. date of filing petition for Writ of Certiorari pursuant to Rule 13 of the United States Supreme Court: January 14, 1991.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Title 18 U.S.C. § 2252(a) (2) (1986) :

- (a) any person who—
- (2) knowingly receives, or distributes any visual depiction that has been transported or shipped in interstate or foreign commerce or mailed or knowingly reproduces any visual depiction for distribution in interstate or foreign commerce by any means including through the mails; if
 - (A) the producing of such visual depiction involves the use of a minor engaging in sexually explicit conduct; and (B) such visual depiction is of such conduct; shall be punished as provided in subsection (b) of this section.
- (b) Any individual who violates this section shall be fined not more than \$100,000.00, or imprisoned no more than 10 years, or both, but, if such an individual has a prior conviction under this section, such individual shall be fined not more than \$200,000.00,

or imprisoned not less than five years nor more than 15 years, or both. Any organization which violates this section shall be fined not more than \$250,000.00.

Title 18 U.S.C. § 2256 (1986) :

For the purposes of this chapter, the term—

- (1) "minor" means any person under the age of eighteen years;
- (2) "sexually explicit conduct" means actual or simulated—
 - (A) sexual intercourse, including genital-genital, oral-genital, anal-genital, or oral-anal, whether between persons of the same or opposite sex;
 - (B) bestiality;
 - (C) masturbation;
 - (D) sadistic or masochistic abuse (for the purpose of sexual stimulation); or
 - (E) lascivious exhibition of the genitals or pubic areas of any person;;
- (3) "producing" means producing, directing, manufacturing, issuing, publishing, or advertising;
- (4) "organization" means a person other than the individual;
- (5) "visual depiction" includes undeveloped film and videotape.

Fourth Amendment to the Constitution of the United States:

The right of people to be secure in their persons, houses, papers, and effects against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by Oath and affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

Fifth Amendment to the Constitution of the United States.

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service time of War or public danger; nor shall any person be compelled in any criminal case to be a witness against himself, or be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

STATEMENT OF THE CASE

Petitioner's Statement of the Case in the Petition for Writ of Certiorari contains a ten page statement of the facts which will not be repeated herein to avoid encumbering the record.

Petitioner was indicted on September 14, 1987 in the United States District Court for the District of Nebraska at Omaha on one count of receiving child pornography, a violation of 18 U.S.C. § 2252(a)(2).

Petitioner was tried before The Honorable Lyle E. Strom and a jury consisting of three men and nine women in Omaha, Nebraska commencing April 19, 1988.

During the testimony of Calvin Comfort, the Postal Inspector in charge of the petitioner's case (T.R. 178:14), the Government sought to introduce Exhibit 7 (T.R. 181:5) which was the membership application and sexual attitude survey sent to the petitioner by the postal inspectors who were operating the American Hedonist Society "sting" from Madison, Wisconsin to attempt to "get targeted individuals to join it and trade (child pornography) through it." (T.R. 166: 15, 19; 170:1). Petitioner's counsel immediately objected (T.R.181:8) and when the Court indicated it was going to overrule the objection and receive the Exhibit, defendant's counsel

asked the court for leave to approach the bench (T.R. 182:24). The trial was adjourned for the day and the court heard objections from defendant's counsel on relevancy, materiality and foundation which begin at page 184 of the trial record and continue through page 205. In the course of these objections, petitioner's counsel expressly advised the court that the evidence was not relevant or material because it did not indicate a predisposition to commit the crime charged in the indictment (T.R. 195:16) and that the only purpose of the evidence was to show that the petitioner had perverted sexual interests. Petitioner's counsel argued that the evidence which the Government was required to adduce was that the petitioner not only had an interest in child pornography but that he would commit a crime to obtain it (T.R. 200:6). The court reserved ruling on the objections.

Later, the prosecution sought to introduce Exhibit 18, 18A and 18B through Comfort. Exhibit 18 was the envelope in which *Bare Boys I and II* had been sent to the petitioner and 18A and 18B were the magazines. Petitioner's counsel again requested permission to approach the bench (T.R. 233:20) and the jury was again excused. The petitioner's objection was that it had been stipulated that it was not a violation of federal law to obtain the material and possession of the magazines was not a crime (T.R. 242:11). Counsel advised the court that the exhibits were remote in time to the offense committed, that they were irrelevant, that they did not evidence an intent to violate the law because they were legally obtained and that foundation was insufficient (T.R. 242:11-244:11). Petitioner's counsel expressly mentioned that there was a problem with receipt of the evidence because the statute, 18 U.S.C. § 2252(a)(2) had been amended to criminalize conduct which was not illegal when *Bare Boys I and II* were ordered and received and the Government was offering them to show a predisposition to commit an offense before it was an offense. The Government's re-

sponse was that the two magazines were a thinly veiled attempt to sexually arouse the viewer (T.R. 238: 3-14). The court received the magazines and immediately gave an instruction that:

. . . This evidence is being received to show what defendant's predisposition may or may not have been with respect to the receipt of material that falls within the definition of the statute. . . . (J.A. 4)

Even though the Government had promised the Court that it would not try the defendant for his sexual preferences (T.R. 203:9), ever after these rulings and other later rulings on the admissibility of further exhibits, this is exactly where the Government focused and that is exactly where it has been focused in every Government brief and argument since.

At the conclusion of the Government's case, petitioner's counsel moved for summary acquittal pursuant to Rule 29 F.R.Cr.P. (T.R. 382: 2). The motion specifically raised the contention that the defendant had been entrapped as a matter of law. (T.R. 383: 16; 385: 12). The court overruled the motion. (T.R. 388: 5-6).

Petitioner's counsel renewed the motion at the close of all the evidence (T.R. 487: 16-21). The Court again overruled the motion (T.R. 487: 22). The jury retired to deliberate on April 26, 1988, and that same day returned a verdict of guilty.

Petitioner renewed his motion for summary acquittal on May 3, 1988 and simultaneously filed a Motion for New Trial pursuant to Rule 33 of F.R.Cr.P.

The trial court overruled the motions, entered judgment of conviction and sentence on June 30, 1988. Notice of Appeal to the Eighth Circuit Court of Appeals was filed July 11, 1988 pursuant to Rule 5(b) F.R.App.P. The case was argued to a panel of the Eighth Circuit Court of Appeals consisting of Chief Judge Donald P. Lay, Circuit Judge George G. Fagg and Senior Circuit Judge Gerald W. Heaney on February 14, 1989.

On January 12, 1990, Senior Circuit Judge Heaney, joined by Chief Judge Lay, reversed petitioner's conviction, holding that petitioner had been entrapped as a matter of law. *United States v. Jacobson*, 893 F. 2d at p. 1002.

On February 7, 1990, the Government petitioned the Eighth Circuit Court of Appeals for rehearing and suggested a rehearing en banc. A rehearing en banc was granted on April 20, 1990. 889 F.2d 1549.

The case was reargued before the entire Eighth Circuit on May 17, 1990. On October 15, 1990, in an opinion by Judge Fagg, the Eighth Circuit en banc vacated the panel's opinion and reinstated the petitioner's conviction. 916 F.2d 467. Senior Circuit Judge Heaney and Chief Judge Lay both filed dissenting opinions. 916 F.2d 470, 471.

Petitioner timely filed a petition for writ of certiorari in the United States Supreme Court on January 14, 1991.

The United States Supreme Court granted certiorari on April 22, 1991. *Jacobson v. United States*, — U.S. —, 113 L.Ed.2d 716, — S.Ct. — (1991).

SUMMARY OF ARGUMENT

The standard of appellate review of the sufficiency of the evidence in a federal criminal case is whether any rational jury, considering all of the evidence in the light most favorable to the Government, could conclude that the defendant was guilty beyond a reasonable doubt. *United States v. Duvall*, 846 F.2d 966 (C.A. 5, 1988).

Where the government has persuaded the trial court to receive evidence that the defendant had a sexual desire to look at pictures of naked boys and the trial court has instructed the jury that such evidence may be considered by the jury as evidence of predisposition the focus of the entrapment defense is changed from an ex-

amination of the defendant's criminal design to gratify a sexual desire and instead has become an investigation of the desire. *United States v. Russell*, 411 U.S. 423, 36 L.Ed.2d 371, 93 S.Ct. 1637 (1973).

There are numerous reasons why the law does not countenance entrapment. Officers of the law should scrupulously avoid undercover tactics which lead to entrapment, because, among other things, entrapment squanders police resources, punishment ceases to be a response but an end in itself and confidence in the legal system is eroded. *United States v. Bogart*, 783 F.2d 1428 (C.A. 9, 1986).

The Circuit Courts have generally agreed that the government must prove predisposition where the defendant raises the entrapment defense by showing that the defendant had an intent or purpose to break the law before anything at all occurred respecting the alleged offense. *United States v. Williams*, 705 F.2d 603 (C.A. 2, 1983).

The Government cannot satisfy this burden by offering proof of the weakness of an innocent party obtained through the defendant's responses to correspondence and sexual attitude surveys secured as a result of undercover operations in which the defendant was solicited to send or receive child pornography but did not.

Where entrapment is properly raised as a defense in the trial court, the Government has the burden to prove beyond a reasonable doubt that the defendant was not induced to commit the crime charged and that he was predisposed to commit the crime charged. *Matthews v. United States*, 485 U.S. 58, 99 L.Ed.2d 54, 108 S. Ct. 883 (1988).

The notion that the Government must prove beyond a reasonable doubt that before anything at all happens with respect to the crime charged in the indictment, the defendant had an intent and purpose to violate the law has

existed an an element of entrapment for years and has been embodied in one of the commonly used entrapment instructions found in 1 Devitt and Blackmar, *Federal Jury Practice and Instructions* § 13.09, p. 224, 3rd Ed., West, 1977, 1990 pocket part. The same instruction also embodies the notion that the Government must suspect that a person is engaged in illicit activity before offering that person an inducement or opportunity to commit a crime. This instruction has been approved time and again, so often that the notion that the defendant must be shown to have an intent to violate the law and the Government must suspect the defendant is engaged in illicit activity before offering an opportunity to commit a crime is firmly established.

An inducement occurs whenever the Government's conduct has created a substantial risk that an offense would be committed by a person other than one ready to commit it. *United States v. Johnson*, 872 F.2d 612 (C.A. 5, 1989).

The circuit courts have identified approximately eleven factors to be considered in determining whether a defendant who raises the entrapment defense has an intent and purpose to violate the law before the Government agents afford him the opportunity to do so. *United States v. Dion*, 762 F.2d 674, 687 (C.A. 8, 1985). When the undisputed facts of this case are compared to the factors, seven factors favor petitioner, two favor the Government, one is a tie and one factor is not present due to the way in which the undercover operation was structured.

Although both the executive and legislative branches of the federal government have recognized that Government detectives should not target individuals for inclusion in Government stings unless they have a reasonable suspicion that the potential target has committed a similar crime in the past or is likely to commit such a crime in the future, these branches have left the adoption of such a rule to the courts. The court should adopt such a rule

by recasting the suspicion requirement already approved in "the standard" jury charge and either expressed or necessarily implied from cases such as *Woo Wai v. United States*, 223 Fed. 412 (C.A. 9, 1915); *Butts v. United States*, 273 Fed. 35, 18 A.L.R. 143 (C.A. 8, 1921); *Casey v. United States*, 276 U.S. 413, 72 L.Ed. 632, 48 S.Ct. 373 (1928); *United States v. Hunt*, 749 F.2d 1078 (C.A. 4, 1984) and *Sherman v. United States*, 356 U.S. 369, 2 L.Ed.2d 848, 78 S.Ct. 819 (1958).

When the requirement of a reasonable suspicion is applied to the facts of this case, it even more emphatically appears that petitioner was entrapped as a matter of law.

Whether the court adopts a reasonable suspicion test or not, this case should be reversed with directions to dismiss the indictment.

ARGUMENT

I. THE DETERMINATION OF WHETHER THE EVIDENCE IS SUFFICIENT TO SUSTAIN A VERDICT OF GUILTY BEYOND A REASONABLE DOUBT IS NOT IRRETRIEVABLY COMMITTED TO THE JURY.

The Courts of Appeal are not sure that "entrapment as a matter of law" survived *Hampton v. United States*, 425 U.S. 484, 48 L.Ed.2d 113, 96 S.Ct. 1646 (1976).

For instance, in *United States v. Markovic*, 911 F.2d 613 (C.A. 11, 1990), the Eleventh Circuit held:

Entrapment as a matter of law is no longer a viable defense in this Circuit.

The Eleventh Circuit cited Footnote 6 from *United States v. Struyf*, 701 F.2d 877 (C.A. 11, 1983) wherein the court said:

The doctrine of Entrapment as a matter of law did not survive the Supreme Court's opinion in *Hampton v. United States*. . . .

This view does not withstand an analysis of Rule 29 of the F.R.Cr.P. nor the traditional function of the trial court in passing upon the sufficiency of the evidence at the conclusion of the government's case and again at the close of all the evidence. Rule 29 states:

(a) Motions for directed verdict are abolished and motions for judgment of acquittal shall be used in their place. The court on motion of a defendant or of its own motion shall order the entry of judgment of acquittal of one or more offenses charged in the indictment or information after the evidence on either side is closed if the evidence is insufficient to sustain a conviction of such offense or offenses. . . .

In *Jackson v. Virginia*, 443 U.S. 307, 61 L.Ed.2d 560, 99 S.Ct. 2781 (1979), 61 L.Ed.2d at 572 n.10, Mr. Justice Stewart stated:

The practice in the Federal Courts of entertaining properly preserved challenges to evidentiary sufficiency, . . . , serves only to highlight the traditional understanding in our system that the application of the beyond-a-reasonable doubt standard to the evidence is not irretrievably committed to jury discretion. To be sure, the fact finder in a criminal case has traditionally been permitted to enter an unsailable but unreasonable verdict of 'not guilty'. This is the logical corollary of the rule that there can be no appeal from a judgment of acquittal even if the evidence of guilt is overwhelming. The power of the fact finder to err upon the side of mercy, however, has never been thought to include a power to enter an unreasonable verdict of guilty Any such practice is wholly belied by the settled procedure of testing evidentiary sufficiency through a motion for judgment of acquittal and post verdict appeal from the denial of such a motion.

II. THE DEFENSE OF ENTRAPMENT HAS TWO RELATED ELEMENTS: GOVERNMENT INDUCEMENT OF THE CRIME AND A LACK OF PREDISPOSITION ON THE PART OF THE DEFENDANT TO ENGAGE IN THE CRIMINAL CONDUCT.

The elements of the entrapment defense were first enunciated in *Sorrells v. United States*, 287 U.S. 435, 77 L.Ed. 413, 53 S.Ct. 210, 86 A.L.R. 249 (1932), and recently reiterated by Chief Justice Rehnquist in *Matthews v. United States*, 485 U.S. 58, 99 L.Ed.2d 54, 102 S.Ct. 883 (1988), 99 L.Ed2d at page 60:

Suffice it to say that the Court has consistently adhered to the view. . . . that a valid entrapment defense has two related elements: government inducement of the crime, and a lack of predisposition on the part of the defendant to engage in the criminal conduct. . . . Predisposition, 'the principal element in the defense of entrapment' . . . focuses upon whether the defendant was an, 'unwary innocent', or, instead, 'unwary criminal' who readily availed himself of the opportunity to perpetrate the crime. . . . The question of entrapment is generally one for the jury, rather than one for the Court. *Sherman v. United States*, 356 U.S. 369, 377, 2 L.Ed. 2d 848, 78 S.Ct. 819 (1958).

Nevertheless, *Sherman* held that the petitioner had been entrapped as a matter of law. In cases which followed it and preceded *Matthews*, *United States v. Russell*, *supra*, and *Hampton v. United States*, *supra*, the defendant admitted predisposition but sought a revision of the entrapment defense which would have grounded it upon the Fifth Amendment rather than rules of statutory construction pronounced in *Sorrells*.

Therefore, any conclusion that the defense of entrapment as a matter of law failed to survive *Hampton*, *supra*, is wholly belied by the settled practice of testing evidentiary sufficiency through a motion for judgment of

acquittal and post verdict appeal from the denial of such a motion.

The court reviews the evidence to determine whether any reasonable juror considering all of the evidence in the light most favorable to the Government could conclude that the defendant was predisposed and not induced by Government agents to commit the crime with which he is charged beyond a reasonable doubt. *United States v. Duvall*, *supra*; *United States v. Lard*, 734 F.2d 1290 (C.A. 8, 1984); *Glasser v. United States*, 315 U.S. 60, 62 S.Ct. 457, 86 L.Ed. 680 (1942).

In *United States v. Bell*, 678 F.2d 549 (C.A. 5, en banc, 1982) aff'd, 462 U.S. 356, 76 L.Ed.2d 638, 103 S.Ct. 2398 (1983), the Fifth Circuit said:

It is not necessary that the evidence exclude every reasonable hypotheses of innocence or be wholly inconsistent with every conclusion save that of guilt, provided a reasonable trier of fact could find that the evidence establishes guilt beyond a reasonable doubt.

Of course, the burden of proof is upon the Government to establish both lack of inducement and predisposition beyond a reasonable doubt. *Matthews v. United States*, *supra*, 99 L.Ed. at p. 62.

III. PREDISPOSITION REQUIRES MORE THAN JUST PROOF THAT THE DEFENDANT HAS A DESIRE TO LOOK AT CHILD PORNOGRAPHY. THE GOVERNMENT MUST PROVE BEYOND A REASONABLE DOUBT THAT THE DEFENDANT WILL COMMIT A CRIME TO GRATIFY HIS FANTASY.

Since the defendant was convicted, it is pertinent to ask him at this point why the verdict is irrational upon consideration of all the evidence viewed in a light most favorable to the Government.

The question presupposes a properly instructed jury which has received only admissible evidence.

Over the extensive objection of the defendant (T.R. 184:16-192:17; 193:5-200:11; 241:20-244:11), the trial court permitted the jury to receive and consider evidence acquired by postal authorities during the "sting" operations for which defendant was targeted prior to operation Looking Glass. The trial court received defendant's answers to certain questions in two sexual attitude surveys, "Heartland Institute for a New Tomorrow" and "Midlands Data Research", both postal inspector's stings. The trial court also received the Midlands Data Research Contact letter, all of the "Carl Long" correspondence, the "New York Native" newspaper the defendant mailed to "Carl Long", the two magazines, *Bare Boys I* and *II* which defendant had ordered from Electric Moon and the so-called called "Everything Brochure" which Dennis Odom had included with the *Bare Boys I* and *II* order.

Defendant's objection to this evidence was clear and specific. The defendant urged that the Government could not establish predisposition by showing that the defendant was "hooked on a feeling;" that is, that he may have had a desire to look at pictures of naked boys or that he had an interest in "stories with a gay theme," "teenage sexuality" or "preteen sex."

The defendant argued that the Government could not rely upon magazines and a brochure which the Government had stipulated it was lawful for the defendant to receive to prove that the defendant would break the law. The defendant claimed that scattered answers from sexual surveys could not be used against the defendant without foundation showing that these answers indicated criminal intent or design.

The trial judge was doubtful that *Bare Boys I* and *II* were relevant. He said:

I guess what bothers me a little bit about it, and it did the other day, Mr. Pendley, is that the nature of those magazines does not suggest illicit sexual ac-

tivity. They were nudist magazines that talked about health and that type of thing, but they are pictures of boys that are totally undressed but whether or not any of that could be conceived by anybody as being sexually explicit—and that's what I am wondering—so I guess I need a little guidance from you as to how you think this is relevant to the issues, and I, of course, have not seen the magazines. (T.R.236: 5-14).

The Assistant District Attorney's response was the definitive statement of the government's argument for the admissibility of all the contested offers:

Your Honor, these photographs of these magazines purport to be nudist magazines. I think if the Court will examine them it is very clear that the nudist theme is an extremely thinly veiled guise to show nude children, and just as one example, Your Honor, the picture of the child that I am holding up from *Bare Boys I* on the left, the color photograph, Your Honor, clearly has nothing to do the naturalist's lifestyle. This is a picture taken by somebody who wants to sell pictures to people who want to look at pictures of naked children and these magazines are full of those kinds of pictures. I will hand them to Mrs. Campbell for Your Honor to look at. (T.R. 238: 3-14).

Defendant's counsel then said:

But, Your Honor, I think there are many, many, many cases in which they say there has to be a specific intent, particularly when you are dealing— (T.R. 250: 19-21).

The Court responded:

Well, you look at the Eighth Circuit cases now. The intent, the specific intent, is not that he know the law and know that he is violating the law. That's not the specific intent that the Court says the defendant had. He has to know that he is receiving—that type of material that he is receiving is the ma-

terial that is described in the statute, it's sexually explicit material involving minors, and that, I realize, is the real abbreviation of it, but if he knows he is receiving that kind of material in the mails, the fact that he doesn't know that the statutes of the United States prohibits that conduct is totally irrelevant. It's a violation of the law.

Specific intent doesn't go to the statute, it goes to the conduct. It goes to the materials involved. . . . (T.R. 250: 22-25, 251: 1-11).

In short, the Government believed, and persuaded the trial judge that predisposition could be shown by proving that defendant's sexual interests were outside the "mainstream". The criminal intent or design required to show predisposition where entrapment is a defense melded in the trial court's mind into petitioner's contention that the statute under which he was prosecuted should be construed to require a specific intent.¹

The Government was wrong for two reasons: first because predisposition has nothing to do with attitudes or desires be they sexual, pharmaceutical or political; it has to do with an "intent to commit the crime" (*United States v. Russell*, *supra*, 36 L.Ed.2d p. 371), and second, because such intent or predisposition must appear "before anything at all occur(s) respecting the alleged of-

¹ Petitioner also argued at his trial that 18 U.S.C. § 2252(a) was unconstitutional because it imposed a severe and stigmatizing penalty, ten years imprisonment and \$100,000.00 fine, was an offense derived from the common law crime of open and notorious lewdness, Part II, Vol. III, A.L.I. Model Penal Code, § 251.1, p. 448 (1980) and appears in Title 18 of the federal criminal code with other specific intent statutes, 18 U.S.C. § 2241, § 1735, § 1737. *Morisette v. United States*, 342 U.S. 246, 96 L.Ed. 288, 72 S.Ct. 240 (1952); *United States v. United Gypsum Company*, 438 U.S. 422, 57 L.Ed.2d 854, 98 S.Ct. 2864 (1978). Petitioner offered instructions which included the element of specific intent (CR 71, 72) and objected to the instruction given by the trial court (T.R. 301). The issue was raised in petitioner's brief in Eighth Circuit but the court's en banc opinion does not discuss it.

fense." *United States v. Williams*, 705 F.2d 603, 618 n.9 (C.A. 2, 1983).

At most, all that this evidence showed was "the weakness of an innocent party" (*Sherman v. United States*, *supra*, 2 L.Ed.2d, p. 853). Almost all of it was obtained after the postal inspectors contacted Jacobson and began to try to induce him to commit a crime. Nevertheless, once the Assistant District Attorney persuaded the trial judge that predisposition focused upon defendant's sexual preferences rather than his criminal intent, the way was wide open to all sorts of prejudicial prosecutorial mischief.

IV. ENTRAPMENT MUST BE SCRUPULOUSLY AVOIDED IN GOVERNMENT UNDERCOVER OPERATIONS FOR A NUMBER OF SOUND LEGISLATIVE REASONS.

Entrapment is contrary to sound legislative policy for a number of reasons. In *United States v. Bogart*, *supra*, although dealing with an alleged violation of due process, the court eloquently stated why "entrapment should be scrupulously avoided." (Attorney General's Guidelines, *infra*.)

Criminal sanction is not justified when the state manufactures crimes that would otherwise not occur. Punishing a defendant who commits a crime under such circumstances is not needed to deter misconduct; absent government involvement, no crime would have been committed. Similarly, a defendant need not be incarcerated to protect society if he or she is unlikely to commit a crime without governmental interference. Nor does the state need to rehabilitate persons who absent governmental misconduct, would not engage in crime. Where the police control and manufacture a victimless crime, it is difficult to see how anyone is actually harmed, and thus punishment ceases to be a response, but becomes an end in itself . . .

The Supreme Court of Canada adopted the entrapment defense in *Regina v. Mack*, (1988) 2 S.C.R. 903. The Court thought it "essential to identify why we do not accept the police strategy that amounts to entrapment," (1988, 2 S.C.R. 941). Justice Lamer said:

... There could be a number of reasons underlying what is perhaps an intuitive reaction against such law enforcement techniques but the following are, in my view, predominant. One reason is that the state does not have unlimited power to intrude into our lives or to randomly test the virtue of individuals. Another is the concern that entrapment techniques may result in the commission of crimes by people who would not otherwise have become involved in criminal conduct. There is perhaps a sense that the police should not themselves commit crimes or engage in unlawful activity solely for the purpose of entrapping others, as this seems to mitigate against the principle of the rule of law. We may feel that the manufacture of crime is not an appropriate use of the police power. It can be argued as well that people are already subjected to sufficient pressure to turn away from temptation and conduct themselves in a manner which conforms to the ideals of morality: little is to be gained by adding to these existing burdens.² Ultimately, we may be saying that there are inherent limits on the power of the state to manipulate people and events for the purpose of attaining the specific objective of obtaining convictions.

² The temptation to engage in pedophilic behavior applies to a wide spectrum of adult males. Dr. Alfred C. Kinsey's report, *Sexual Behavior in the Human Female*, Kinsey, et al., W.B. Saunders Co., Philadelphia, 1953, discloses that of the eight thousand adult women surveyed, about one fourth of them reported sexual contact with an adult male before they had attained the age of twelve.

The *Diagnostic and Statistical Manual of Mental Disorders*, Third Edition (DSM-III-R), American Psychiatric Association, Washington, D.C., 1987 reports that sexual contact between pre-pubescent (age twelve or under) boys with an adult male is approximately one half the rate for girls.

Petitioner would add another important reason to Justice Lamer's list. It is simply a waste of limited police resources to expend time and money inducing people to commit crimes they have never contemplated when there are so many crimes committed by persons who fully intend to violate the law which require detection and prosecution.

Finally, as Justice Lamer also stated:

If the Court is unable to preserve its own dignity by upholding values that our society views as essential, we will not long have a legal system which can pride itself on its commitment to justice and truth and which commands respect of the community it serves. It is a deeply ingrained value in our democratic system that the ends do not justify the means.

V. BOTH THE ATTORNEY GENERAL OF THE UNITED STATES AND A SELECT COMMITTEE OF THE UNITED STATES SENATE HAVE RECOGNIZED METHODS OF STRUCTURING GOVERNMENT STING OPERATIONS WHICH AVOID ENTRAPMENT.

The *Abscam* hearings reflect that the Executive Branch of the Federal Government has clearly recognized that for all of the foregoing reasons, it was not:

"the intention of the Congress in enacting this statute (18 U.S.C. 2252 (a)) that its processes of detection and enforcement should be abused by the instigation by government officials of an act on the part of persons otherwise innocent in order to lure them to its commission and to punish them." *Sorrells*, *supra*, 77 L.Ed. at p. 420.

The final report of the Select Committee to Study Undercover Activities of Components of the Department of Justice to the United States Senate, Senate Report No. 97-682, December 15, 1982, set out the Attorney General's Guidelines for Federal Bureau of Investigation undercover operations promulgated January 1, 1981,

effective February 1, 1981 at p. 550. The guidelines state:

(1) Entrapment should be scrupulously avoided. Entrapment is the inducement or encouragement of an individual to engage in illegal activity in which he would not otherwise be disposed to engage.

(2) In addition to complying with any legal requirements, before approving an undercover operation involving an invitation to engage in illegal activity, the approving authority should be satisfied that:

(a) The corrupt nature of the activity is reasonably clear to potential subjects;

(b) There is a reasonable indication that the undercover operation will reveal illegal activities; and

(c) The nature of any inducement is not unjustifiable in view of the character of the illegal transaction in which the individual is invited to engage.

(3) Under the law of entrapment, inducement may be offered to an individual even though there is no reasonable indication that that particular individual has engaged or is engaging in the illegal activity that is properly under investigation. Nonetheless, no such undercover operations shall be approved without the specific written authorization of the Director *unless* the Undercover Operations Review Committee determines (See Paragraph 8) insofar as practicable that either:

(a) there is a reasonable indication, based on information developed through informants or other means that the subject is engaging, has engaged or is likely to engage in illegal activity of a similar type; or,

(b) the opportunity for illegal activity has been structured so that there is reason for believing that persons drawn to the opportunity, or

brought to it, are predisposed to engage in the contemplated illegal activity.

(4) In any undercover operation, the decision to offer an inducement to an individual, or to otherwise invite an individual to engage in an illegal activity, shall be based solely on law enforcement considerations.

The Select Committee recommended that Congress adopt legislation containing a requirement of a "reasonable suspicion based upon articulable facts" before an individual is targeted for undercover operations (Report, p. 377). The report also recommended that the duration of undercover operations be limited to six months to minimize the possibility of overly persistent solicitation. *United States v. Dion*, 762 F.2d 674, 686 (C.A. 8, 1985) n.9.

Although the government may argue that Congressional inaction weakens these findings, the Court has noted before that the failure of Congress to act is not a reliable indicator of Congressional intent. *United States v. Price*, 361 U.S. 304, 4 L.Ed.2d 334, 339, 80 S.Ct. 326 (1960).

Both the Legislative and the Executive Branches of the government have recognized, therefore, the danger that Government "sting" operations will result in entrapment; the Attorney General has laid out the manner in which an undercover operation can be structured so that it does not cause entrapment and the Senate Select Committee has recommended legislation embodying a standard of reasonable suspicion based on articulable facts.

VI. PETITIONER DID NOT QUALIFY FOR INCLUSION IN THE UNDERCOVER OPERATION IN WHICH HE WAS ENSNARED UNDER GUIDELINES ESTABLISHED FOR THAT OPERATION BY THE POSTAL AUTHORITIES AND THE DEPARTMENT OF JUSTICE.

The postal inspectors in this very case established guidelines to avoid entrapment with the help of the Department of Justice (T.R. 95:19). The guidelines contain some of the features impressed by the Attorney general upon the Federal Bureau of Investigation. For instance, the individuals included in Project Looking Glass were to have responded to at least one regional testing program in the three years preceding the start of the project (T.R. 96, 97). However, according to the postal inspector who devised Project Looking Glass, Ray Mack, testing was the postal inspectors' way of contacting individuals who had either committed a crime or were in the act of committing a crime (T.R. 92). There is no evidence that Jacobson had done either, so he should not have been tested. Persons were targeted, according to Mack, only if their names had come from two independent sources (T.R. 96: 25) Individuals were included if their names were on a mailing list that had been seized by a postal inspector in the last seven or eight years (T.R. 96).

Petitioner's name had come to the postal inspectors' attention because it was on a single mailing list, Electric Moon's. He had been sent the American Hedonist Society and Midland's Data Research surveys because his name had appeared in this single source. Calvin Comfort sent petitioner's name to Ray Mack solely because it had been found in the Electric Moon search and he had responded to the two sexual attitude surveys. (T.R. 211:24). It does not appear that Comfort cared what petitioner had responded, just that there was a response.

Therefore, petitioner's name had not come from two independent sources, it came from one independent source,

Electric Moon. Two postal department undercover operations had been employed against Jacobson, American Hedonist Society and HINT neither of which had indicated that Jacobson had committed a crime, was engaged in a course of criminal conduct or was likely to commit a crime.

A third postal inspector's undercover operation, the "mirroring" technique employed by the "Carl Long" correspondence had also failed to produce evidence that Jacobson had violated the law or would violate it. The first contact between the postal inspectors and Jacobson had occurred about February 21, 1985 (E7) when Jacobson completed the Hedonist Society membership application.

The Select Committee's fears were realized. Jacobson had already suffered overpersistent solicitation and he did not qualify for inclusion in Project Looking Glass. The postal inspectors certainly had no reason to believe that he was either engaging, had engaged or was likely to engage in illegal activity. Furthermore, the corrupt nature of Looking Glass does not appear to be reasonably clear to potentially naive subjects.

The Far Eastern Trading Company contact letter states that the customs service is trying to find "children's pornography" (E1). It states that the company has found that if material is given to "your post . . . a search warrant must be gotten in order to open your mail". It also says: "After Consultations with American Solicitors, we have been advised that once we have posted our material through your system, it cannot be opened for any inspection without authorization of a Judge." The letter infers that it is illegal for Far Eastern Trading Company to import children's pornography. It does not make it clear that it is a crime for petitioner to receive it.

Title 18 Sec. 2252(a)(2) had been amended in 1984 to make it an offense to receive sexually explicit material depicting children. No. 98-292, Sec. 4, 98 Stat. 204.

Although ignorance of the law may be no excuse, if petitioner was unaware, as he testified, that it was a crime to receive *Boys Who Love Boys*, that would certainly bear on the intent required to prove predisposition. (T.R. 428:13).

To this, the Government has persistently responded that petitioner should hardly have been surprised to learn that receipt of child pornography is not an innocent act, e.g. *United States v. Freed*, 401 U.S. 601, 28 L.Ed.2d 356, 91 S.Ct. 112, (1972). The logical rejoinder to that is that until May 21, 1984, receipt of child pornography had never been against federal law, Nebraska did not have a statute making it an offense to possess it until July 9, 1988, Neb. Rev. Stat. Sec. 28-813.01, 1943 (Supp. 1988); Laws 1988, L.B. 117, § 7, effective date July 9, 1988, and the postal inspectors themselves had made it appear lawful.

VII. THE STANDARD ENTRAPMENT INSTRUCTION IN DEVITT AND BLACKMAR, VOL. 1 FEDERAL JURY INSTRUCTIONS, SEC. 13.13 WHICH HAS BEEN APPROVED BY MANY OF THE FEDERAL CIRCUIT COURTS STATES THAT THE GOVERNMENT MUST PROVE BEYOND A REASONABLE DOUBT THAT THE DEFENDANT HAD A PREVIOUS INTENT OR PURPOSE TO VIOLATE THE LAW BEFORE ANYTHING AT ALL OCCURRED RESPECTING THE ALLEGED OFFENSE.

Although there can be no doubt that the elements of entrapment are "predisposition" and "inducement", that does not say what constitutes evidence of predisposition, when it must appear or how "inducement" should be defined.

From what is apparently the first case "in which a Federal Court clearly recognized and sustained a claim of entrapment" (Justice Frankfurter dissenting in *Sherman*, 2 L.Ed.2d at p. 854), *Woo Wai v. United States*, 223 Fed. 412, (C.A. 9, 1915), the circuit courts have agreed that the Government needs some evidence that "Prior to the time when the detective first approached,

(the defendant) the defendant had committed or thought of committing an offense." *Woo Wai*, 223 Fed. at p. 414.

For years, the federal district courts have relied upon an entrapment instruction set forth in Devitt and Blackmar, Vol. 1, *Federal Jury Practice and Instructions*, § 13.13 (2d Ed., West, 1970, § 13.09, 3rd Ed., West, 1977). The instruction, which appears at page 290 and 291 of the second edition states:

The defendant asserts that he was a victim of entrapment as to the offense charged in the indictment.

Where a person has no previous intent or purpose to violate the law, but is induced or persuaded by law enforcement officers or their agents to commit a crime, he is a victim of entrapment, and the law as a matter of policy forbids his conviction in such a case.

On the other hand, where a person already has the readiness and willingness to break the law, the mere fact the government agents provide what appears to be a favorable opportunity is not entrapment. For example, when the government suspects that a person is engaged in the illicit sale of narcotics, it is not entrapment for a government agent to pretend to be someone else and to offer, either directly or through an informer or other decoy, to purchase narcotics from the suspected person.

If, then, the jury should find beyond a reasonable doubt from the evidence in the case that, before anything at all occurred respecting the alleged offense involved in this case, the defendant was ready and willing to commit crimes such as are charged in the indictment, whenever opportunity was afforded, and that government officers or their agents did no more than offer the opportunity, then the jury should find that the defendant is not a victim of entrapment.

On the other hand, if the evidence in the case should leave you with a reasonable doubt whether the defendant had the previous intent or purpose to commit

an offense of the character charged, apart from the inducement or persuasion of some officer or agent of the government, then it is your duty to find him not guilty.

In *United States v. Brown*, 453 F.2d 101 (C.A. 8, 1971), at p. 106, the court said of this instruction:

We find that the court's instruction properly follows the standards governing the issue of entrapment.

In *United States v. Williams*, 705 F.2d 603 (C.A. 2, 1983) at p. 816, n.9 the court refers to this identical instruction as "the standard charge."³

The instruction flatly tells the jury that if, "before anything at all occurred respecting the alleged offense", the accused had "no intent or purpose to violate the law" he has been entrapped. The instruction requires the Government to suspect that the defendant is engaged in some illicit conduct before the Government offers the defendant an opportunity to break the law. In a justice system based on reason, such a suspicion could hardly be understood to be an unreasonable suspicion, hunch or gut reaction, unsupported by some articulable circumstance.

³ The Devitt and Blackmar instruction has also been approved by the Eighth Circuit in *United States v. Pollard*, 483 F.2d 929 (C.A. 8, 1973); *United States v. Willard*, 518 F.2d 987 (C.A. 8, 1975); *United States v. Dawson*, 467 F.2d 668 (C.A. 8, 1972); *United States v. Haley*, 452 F.2d 398 (C.A. 8, 1971), *cert. denied*, 405 U.S. 977, 38 L.Ed.2d 97, 92 S.Ct. 1205 (1972) and *United States v. Shaw*, 570 F.2d 770 (C.A. 8, 1978). Versions of similar instructions substituting the words "reasonable cause to believe" for "suspects" have been approved in *Trice v. United States*, 211 F.2d 513 (C.A. 9, 1954); *United States v. Griffin*, 434 F.2d 978 (C.A. 9, 1971), *cert. denied*, 402 U.S. 995, 29 L.Ed.2d 160, 91 S.Ct. 2170 (1971), rehearing denied, 404 U.S. 877, 30 L.Ed.2d 124, 92 S.Ct. 27 and *Hansford v. United States*, 303 F.2d 219, 225 (D.C. Cir. 1962), citing *Cratty v. United States*, 163 F.2d 844 (D.C. Cir. 1947). When Judge Heaney wrote in his Eighth Circuit panel opinion that petitioner was entrapped as a matter of law because the Government did not have a reasonable suspicion that he had committed a crime or was likely to commit a crime, he was not making new law, he was remembering old law.

The most recent pocket part, the 1990 pocket part to Volume One of the 1977 (3rd) Edition repeats the quoted instruction at page 225 adding only this sentence at the end:

The burden is on the government to prove beyond a reasonable doubt that the defendant was not entrapped.

The text states the reason for the change thus:

The instruction in the bound volume was challenged in *United States v. Johnson*, 590 F.2d 250 (7th Cir., 1979), rehearing en banc 605 F.2d 1025 (7th Cir.), *cert. denied* 444 U.S. 1033, 62 L.Ed.2d 670, 100 S.Ct. 706, because it did not expressly state that the burden is on the government to prove beyond a reasonable doubt that defendant was not entrapped. The instruction has been revised in the light of *Johnson*, even though the court, on rehearing en banc, withdrew the panel opinion and held that the text was sufficient.

Therefore, the Government needs to show more than that the defendant is a drug addict or a homosexual or wears leather and rides a Harley. The Government must show the defendant has an intent and purpose to violate the law before Government detectives offer an opportunity to break the law. Otherwise, the Government will not and should not prevail. Petitioner has persistently argued that an individual cannot be found willing to break the law upon evidence that he has a weakness, a taste or a congenital desire. Petitioner is right.

VIII. WHERE GOVERNMENT CONDUCT CREATES A SUBSTANTIAL RISK THAT AN OFFENSE WILL BE COMMITTED BY A PERSON OTHER THAN ONE READY TO COMMIT IT, INDUCEMENT HAS OCCURRED.

The red flag of inducement is raised when the Government incites to and creates crime in order to punish it. *Butts v. United States*, 273 Fed. 35, 18 A.L.R. 143 (C.A.

8, 1921), 213 Fed. at p. 38. "When the criminal design originates with officials of the Government, and they implant in the mind of an innocent person the disposition to commit the alleged offense," *Sorrells*, 77 L.Ed. at p. 417, the court must be wary of inducement. Where the Government's conduct has created a substantial risk that an offense would be committed by a person other than one ready to commit it, inducement is present. *United States v. Johnson*, 872 F.2d 612, 620 (C.A. 5, 1989); *United States v. Martinez*, 488 F.2d 1088 (C.A. 9, 1973). Government inducement can take the form of persuasion, fraudulent representations or pleas based on sympathy, need or friendship. *United States v. Ortiz*, 804 F.2d 1161 (C.A. 10, 1986); *United States v. El-Gawli*, 837 F.2d 142 (C.A. 3, 1988).

The red flags fly in a stiff breeze in this case. Ray Mack's plan for intelligence gathering, the execution of which did not contemplate selling anything (T.R. 95:6) was administratively elevated in Washington, D.C. to a national program in which the postal authorities would actually solicit, advertise, sell, manufacture and deliver child pornography. The targets were completely passive. All they had to do was mail in their money, pick up the contraband at the post office and prepare to be indicted. It is hard to imagine a criminal enterprise more completely created and controlled by the government. In *United States v. Lard*, *supra*, the court observed

... although the Supreme Court has sharply divided on the proper standard for applying the entrapment defense, it is generally agreed that 'the conduct with which the defense is concerned is the manufacturing of crime by law enforcement officials and their agents'. *Lopez v. United States*, 373 U.S. 427, 10 L.Ed.2d 462, 83 S.Ct. 1381, 1385 (1963); *Russell*, 411 U.S. at 439 (Mr. Justice Stewart, dissenting).

IX. APPLYING THE RECOGNIZED ELEMENTS OF INDUCEMENT AND PREDISPOSITION TO THE FACTS OF THIS CASE, SHOWS THAT THE PETITIONER WAS ENTRAPPED AS A MATTER OF LAW.

The courts have recognized several elements to be considered in deciding whether predisposition exists. In *United States v. Kaminski*, 703 F.2d 1004, 1008 (C.A. 7, 1983), the court began by noting that predisposition is:

'The defendant's state of mind and inclinations before his initial exposure to government agents,'

then turned its attention to the factors relevant in determining predisposition:

Among these are the character or reputation of the defendant, including any prior criminal record; whether the suggestion of the criminal activity was initially made by the Government; whether the defendant was engaged in the criminal activity for profit; whether the defendant evidenced reluctance to commit the offense, overcome only by repeated Government inducement or persuasion; and the nature of the inducement or persuasion supplied by the Government. While none of the factors alone indicates either the presence or absence of predisposition, the most important factor . . . is whether the defendant evidenced reluctance to engage in criminal activity which was overcome by repeated Government inducement.

The Eighth Circuit Court of Appeals in *United States v. Dion*, 762 F.2d at p. 687, created a comprehensive catalogue of the factors employed to determine predisposition:

The lower courts have looked to a variety of factors in determining predisposition including: (1) Whether the defendant readily responded to the inducement offered. *United States v. Hunt*, 749 F.2d 1078 (C.A. 4, 1984); (2) the circumstances surrounding the illegal conduct, *id*; (3) the state of mind of a defendant before government agents make any

suggestion that he shall commit a crime, *id.*, citing *United States v. Williams*, 705 F.2d 603 (C.A. 2, 1983) . . .; (4) whether the defendant was engaged in an existing course of conduct similar to the crime for which he was charged, *United States v. Vivano*, 437 F.2d 295 (C.A. 2, 1981) . . .; (5) whether defendant had already formed the 'design' to commit the crime, with which he is charged, *id.*; (6) the defendant's reputation, *Russell*, 411 U.S. at 443, 93 S.Ct. at 1648 . . .; (7) the conduct of the defendant during the negotiations with the undercover agent, *United States v. Costello*, 483 F.2d 1366 (C.A. 5, 1973); (8) whether defendant had refused to commit similar acts on other occasions, *Kadis v. United States*, 373 F.2d 370 (C.A. 1, 1967); (9) the nature of the crime, *United States v. Jannotti*, 673 F.2d 578 (C.A. 3, 1982, en banc) . . .; and (10) 'the degree of coercion present in the instigation law officers have contributed to the transaction' relative to the 'defendants criminal background', *United States v. Townsend*, 555 F.2d 152 (C.A. 7, 1977). In *United States v. Lard*, 743 F.2d at 1293, we relied on *Townsend* for the principal that 'determining a defendant's predisposition requires examination of the defendant's personal background to see where he sits on the continuum between the naive first offender and the street wise habitué'.

When the above factors are applied to the facts of this case, Jacobson did not readily respond to the advertisements in the Hedonist Society Newsletter nor did he complete the Midlands Data Research Survey when it was first sent him, nor did he initiate the "Carl Long" correspondence or pursue it.

He did, however, respond to the "Borderline" and "Looking Glass Stings" but without knowing that he was breaking the law. The circumstances surrounding Jacobson's illegal conduct were completely created and controlled by the Government. No evidence whatsoever exists that the petitioner's state of mind prior to the initiation

of either the Borderline or Looking Glass stings was criminally bent.

There was no evidence that Jacobson was engaged in an existing course of conduct and no evidence that he had formed a design to commit any crime, let alone, the one with which he would be charged. Petitioner's reputation in his community was excellent.

His conduct during negotiations with the undercover agent is really unassessable since direct negotiations did not occur. Petitioner had refused to commit similar acts on other occasions.

There was no coercion in the instigation by the postal inspector. His method was trick, not force.

The search warrant did not reveal a vast pedophilic collection. The Postal Authorities discovered only what they knew they'd discover. Petitioner is far toward naive first offender on the continuum between that and the street wise habitué.

All three branches of the Federal Government have recognized in varying ways the need to adopt rules which will scrupulously avoid entrapment in federal undercover operations. All have recognized to varying degrees that detectives should have a reasonable suspicion before soliciting or inducing individuals to commit a crime that the individual has committed a similar crime, is engaged in a course of criminal conduct, or is likely to commit such a crime in the future.

The Government had no such evidence in this case. Congress, of course, has never spoken on this subject and so the decision is left where it has always been, to the courts. *Matthews*, 99 L.Ed. 2d at p. 63. Jacobson's conviction is very dubious based on the eleven factors identified in *Dion, supra*. A fair count shows that Jacobson prevails on the undisputed evidence seven to two with one tie and one inapplicable. When the reasonable suspicion

requirement is imposed on the Government, then Jacobson's conviction is even more emphatically wrong.

CONCLUSION

This case should be reversed and dismissed.

Respectfully submitted,

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